(6)

No. 95-1873

In The

Supreme Court of the United States

October Term, 1996

GUY E. ADAMS, *et al.*,

Petitioners,

v.

CHARLIE FRANK ROBERTSON and LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the certification and settlement of this nationwide state court class action, with no right to opt out, violate the Due Process Clause of the Fourteenth Amendment when the claims extinguished by the settlement are predominately, if not exclusively, monetary damages claims.

LIST OF PARTIES

Petitioners are policyholders of Liberty National Life Insurance Company whose cancer policies were fraudulently exchanged by Liberty National and who objected to the certification and settlement of this class action. Petitioners' respective appeals to the Alabama Supreme Court were decided by the opinion in *Guy E. Adams v. Charlie Frank Robertson*, 676 So. 2d 1265 (Ala. 1995) (Pet. App. 1a-20a). The names of all of the Petitioners are listed in the Appendix to this brief at 9a-22a.

Respondents are Charlie Frank Robertson, the Plaintiff and Class Representative, and Liberty National Life Insurance Company, the Defendant.

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The opinion of the Alabama Supreme Court is reported at 676 So. 2d 1265 (Ala. 1995) (Pet. App. 1a-20a). The findings of fact and conclusions of law and the order of the Circuit Court of Barbour County, Alabama, which were affixed as an appendix to the opinion of the Alabama Supreme Court, also are reported at 676 So. 2d 1265, beginning at page 1274. (Pet. App. 21a-92a and 93a-106a, respectively).

JURISDICTION

The decision of the Alabama Supreme Court was rendered on December 22, 1995, and a timely application for rehearing was denied on February 16, 1996. (Pet. App. 108a). The petition for a writ of certiorari was filed on May 16, 1996, and was granted on October 1, 1996. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . " The text of Rule 23 of the Alabama Rules of Civil Procedure and the text of Rule 23 of the Federal Rules of Civil Procedure are set out in the Appendix at pages 1a-4a and 4a-8a, respectively.

STATEMENT OF THE CASE

This case presents the question of whether the Due Process Clause is violated by the certification and settlement of a nationwide state court class action with no right to opt out, for the purpose of extinguishing the individual and predominately monetary damages claims of class members. The Alabama Supreme Court, focusing solely upon the injunctive relief purportedly afforded by the settlement and wrongly determining that the relief provided in the settlement was not predominately for money damages, erroneously concluded that due process, as enunciated by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), did not prohibit the certification and settlement, with no opt out, of this class of over 400,000 cancer insurance policyholders of Respondent Liberty National Life Insurance Company ("Liberty National"). (Pet. App. 86a-87a). An examination of the nature of the relief sought in the complaint and the claims foreclosed by this settlement, however, confirms that the class action procedure has been misused in order to thwart the requirement that class members in actions seeking predominately monetary damages be given the opportunity to exclude themselves from the class.

A. The Underlying Dispute.

This action arose out of a massive "cancer policy exchange program" conducted by Liberty National between 1986 and 1993 to induce owners of existing Liberty National cancer policies to exchange their policies for new cancer policies. The policies sold prior to 1986

included 100% coverage for radiation therapy, chemotherapy, and all drugs and medicines prescribed for use outside the hospital in the treatment of cancer ("old policies"). The new cancer policies contained some additional benefits but (1) limited coverage for radiation and chemotherapy to $500 per day, (2) limited coverage for prescription chemotherapy drugs, and (3) eliminated any coverage for other out-of-hospital prescription drugs such as pain or anti-nausea medication ("new policies"). *Liberty Nat'l Life Ins. Co. v. McAllister*, 675 So. 2d 1292, 1295 (Ala. 1995) (Pet. App. 137a-39a).

Liberty National instituted the exchange program and developed the new policies to stem a dramatic increase in claims costs that it began incurring on the old cancer policies in the early 1980's as a result of the unlimited radiation, chemotherapy, and prescription drug benefits. (Testimony of John Samford, President of Liberty National from 1982 to 1989, McAllister Transcript ["McA."] 1103-12).[1] The majority of the old policies were guaranteed renewable for life and therefore Liberty National could only alter the unlimited benefits by inducing policyholders to exchange their old policies. (*Id.*).

Liberty National set about to convince policyholders, almost all of whom were debit route customers, to exchange their old policies for the new policies by not disclosing to policyholders that the unlimited benefits, which had been the major selling point of the old policies (Testimony of Robert I. Stewart, President of Liberty

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[1] The transcript and trial exhibits from *McAllister* (Pet. App. 136a-151a), are a part of the record in this case but were not separately numbered by the clerk. (Pet. App. 48a).

National from 1976 to 1982, Tr. 340;[2] McA. 583-84), were restricted or eliminated in the new policies. *See McAllister*, 675 So. 2d at 1295 (Pet. App. 139a). In addition to limiting its exposure on the previously unlimited benefits, Liberty National charged higher premiums for the new policies by misrepresenting that they were better policies. (*Id.*). Liberty National further fraudulently increased premiums by shifting policyholders who had purchased policies when they were younger into older age bands.[3] (*See, e.g.*, J.A. 545-46;[4] Tr. 528).

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[2] The designation "Tr.___" refers to the Reporter's Transcript of the Fairness Hearing.

[3] When health insurance, such as cancer insurance, is purchased, the insured is rated and charged a premium based upon the age band into which the insured falls on the date of the issuance of the policy. Younger insureds pay lower premiums than older insureds for the same coverage. For purposes of premium computation, a policyholder who purchased his or her policy at age 25 will always be charged a premium based upon his or her age on the date of the issuance of the policy, even as to later premium increases. In other words, if the 25 year old policyholder ages ten years, his or her premium, for rating purposes, is still based upon his or her age on the date of the issuance of the policy. When Liberty National exchanged the old cancer policies, Liberty National charged class members, many of whom had owned their cancer insurance policies for years before the exchange, a new premium based upon their age on the date of the exchange, i.e., the date of issuance of the new policy. Accordingly, when the exchange of the cancer policies occurred, the premium paid by many class members on the new policy was higher not only because the new policy was more expensive, but also because they were in an older age bracket at the time of the exchange. (J.A. 545-46).

[4] The designation "J.A. ___" refers to the Joint Appendix.

The nature of the misrepresentations made by Liberty National's agents in order to convince policyholders to exchange their policies varied greatly. Tactics included, for example, using incorrect summaries of the coverage provided by the old policies (Tr. 338-40) and misrepresenting to policyholders that the old policy would lapse if the policyholders did not agree to the exchange (Tr. 657-58). In the course of exchanging the cancer policies, Liberty National agents also implemented other fraudulent schemes to increase commissions, including, for example, exchanging an old family cancer insurance policy for two new individual policies to a husband and a wife and thereby obtaining "double" premiums; switching the named insured from one spouse to the other; and switching policyholders from old policies to "senior" cancer policies which provided approximately half of the benefits provided by the old policies. (*See, e.g.*, R. 2779-805,[5] 3089-90).

By the fall of 1992, Liberty National's fraudulent conduct began to result in lawsuits being filed against Liberty National as policyholders discovered that they had been deceived, often as a result of the filing of a claim against a new policy. (*See, e.g., McAllister*, 675 So. 2d at 1296, Pet. App. 140a). Over 30 individual cases involving the cancer exchange program already were pending against Liberty National at the time this class was certified preliminarily on March 10, 1993. In addition to the cases outside the class which were filed by Class Counsel and are discussed below, two others warrant particular note. In *Boswell v. Liberty Nat'l Life Ins. Co.*, 643 So. 2d 580

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[5] The designation "R. ___" refers to the clerk's record.

(Ala. 1994), the Alabama Supreme Court held that the payment of additional premiums for a new cancer policy by a victim of the cancer exchange program constituted damages sufficient to sustain a claim for compensatory and punitive damages for fraud under Alabama law, even though the policyholder had not had cancer and had not made a claim against the new policy. In *McAllister*, the Alabama Supreme Court affirmed a $1,001,000 jury verdict in favor of a policyholder whose old policies had been fraudulently exchanged for new policies but who also had not made a claim under her new policies.

B. The Class Action.

Class Representative Charlie Frank Robertson ("Class Representative" or "Robertson") initially filed a complaint against Liberty National in the Circuit Court of Barbour County, Alabama, in May 1992, based upon allegedly unauthorized loans on a *life* insurance policy. (J.A. 31-35). On October 2, 1992, Robertson filed an "amendment to complaint" adding claims against Liberty National on behalf of all individuals whose old *cancer* policies had been exchanged for new policies and a motion for an order certifying a class action pursuant to Alabama Rules of Civil Procedure 23(a), 23(b)(2) and 23(b)(3). (J.A. 42-44). The amended complaint sought *"money damages for fraud,"* and the motion for certification, which included a request for certification pursuant to Rule 23(b)(3),[6] stated that the action was brought *"for damages."*

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[6] This case was certified pursuant to Rules 23(b)(2), 23(b)(1)(A) and 23(b)(1)(B) of the Alabama Rules of Civil Procedure. (App. 1a-4a). Alabama Rule 23 is identical to Rule 23 of the Federal Rules of Civil Procedure (App. 5a-8a) and, accordingly, Petitioners cite to "Rule 23" in lieu of identifying whether the Alabama or Federal rule is referenced unless the context requires otherwise.

On October 6, 1992, Class Counsel filed a separate lawsuit in Barbour County on behalf of another victim of the cancer policy exchange program, Louise Peel. (J.A. 45-49). The complaint in Mrs. Peel's separate suit, which was still pending at the time of the fairness hearing in January, 1994 (Tr. 700), also sought only *"compensatory and punitive damages"* for Liberty National's fraudulent conduct in exchanging her cancer policy, not injunctive relief.

At the hearing on the motion for certification on October 16, 1992, Class Counsel stated unequivocally that the relief sought in this action included certification of a Rule (23)(b)(3) class for money damages. (J.A. 62). When the hearing was reconvened on March 8, 1993, Class Counsel, contrary to previous statements made regarding the type of certification sought, requested non opt out certification only pursuant to Rule 23(b)(2), and Liberty National made no factual or legal arguments against class certification. (J.A. 74-75).

On March 10, 1993, the Circuit Judge entered an order preliminarily certifying a non opt out class pursuant to Rule 23(b)(2). The order defined the class as follows:

> All past and present insureds under cancer policies issued by Liberty National Life Insurance Company ("Liberty National") providing unlimited coverage for radiation, chemotherapy, and

> out-of-hospital prescription drugs ("old policy"), which coverage was effective on or after August 29, 1986, the date that Liberty National offered new replacement cancer policies limiting coverage for radiation, chemotherapy, and out-of-hospital prescription drugs ("new policy"), *excluding from the certified class any insured, who on or before the date of this class certification order, has filed a separate action against Liberty National asserting claims arising out of the cancer policies on coverage.*

(J.A. 89-91) (emphasis added). The class includes approximately 206,000 policyholders, like Petitioners, whose policies were fraudulently exchanged and 191,000 policyholders who had cancer or whose policies otherwise were not exchanged. (Tr. 495).

The class certification order limited class membership to all insureds who had *not* filed suit on the cancer policies on or before March 10, 1993. This provision was critically important to both Class Counsel and Class Counsel's *individual* clients, who did not want to be limited to the class settlement. In addition to the suit previously filed on behalf of Mrs. Peel, Class Counsel, on the same day the Circuit Judge preliminarily certified the class, filed two lawsuits on behalf of four other plaintiffs in Barbour County against Liberty National based upon the cancer exchange program. (J.A. 79-81, 82-85). These two other lawsuits outside the class, like Mrs. Peel's complaint and the complaint in this action, sought only *"compensatory and punitive damages."* (*Id.*).[7]

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[7] The manipulation of the class definition to permit the exclusion of Class Counsel's own personal clients is even more outrageous in light of the evidence that Class Counsel and Liberty National had settled this class action, at least in principle, *prior* to certification of the class. On November 20, 1992, only a month after the delay of the certification hearing, Liberty National submitted "settlement" policies to the Alabama Department of Insurance. (Tr. 491-92). Liberty National also attempted to have a "no opt out" class certified in regard to the cancer exchange program in separate litigation pending in Mobile County, Alabama, in late 1992 or early 1993. (Brief in Support of Petition for Writ of Mandamus in *Ex parte Eunice W. Long*, No. 1921852, Ex. R at 10-12; Exhibit A to Petitioners' brief on appeal to Alabama Supreme Court).

The Circuit Judge's order of January 29, 1993, setting a hearing for March 8, 1993, on the motion for certification stated that he was setting the motion because it had been " . . . set once, and continued by the Court due to representations by counsel for Defendant *that this action and other related cases were to be settled. . . .* " (emphasis added). (J.A. 77). An entry on the docket sheet for March 8, 1993 states, *"Class Action settled.* Attorneys to prepare order." (J.A. 4) (emphasis added).

Such conduct calls into serious question Class Counsel's adequacy of representation and highlights the need for allowing absent class members to control their individual claims. *See* Susan P. Koniack, *Feasting While the Widow Weeps*, 80 Cornell L. Rev. 1045, 1125 (1995) (courts should prohibit the simultaneous representation of individuals and a class against a common defendant).

On the same day that the Circuit Judge preliminarily certified the class, he also issued an order dismissing Counts One and Two of Robertson's complaint regarding his Liberty National life insurance policy. (J.A. 92). During the fairness hearing, it was confirmed at that time that Robertson had settled those claims on his life insurance policy, which were in no way related to the cancer policy exchange program, for $150,000. (Tr. 677).

C. The Class Action Settlement.

On June 16, 1993, Liberty National and Class Counsel filed a Stipulation and Agreement of Compromise and Settlement ("Stipulation"). (J.A. 127-65). That document set forth provisions of a proposed settlement which, among other things, did not allow any class members to opt out and required all class members who had not made claims pursuant to their cancer policies to release any pending or future claims for compensatory and punitive damages without any monetary compensation. The settlement provided only for the reformation of new cancer policies so that they would provide the same coverage with respect to radiation, chemotherapy and prescription drugs as was provided under the old policies and for a moratorium on premium increases on the new policies reformed by the settlement until January 1, 1995. In addition, class members who incurred out-of-pocket expenses for claims for radiation, chemotherapy or out-of-hospital prescription drugs which were not covered in whole or in part by the new policies were eligible to obtain reimbursement of the out-of-pocket expenses, to share in an Incidental Monetary Settlement Fund of only $1 million ("Incidental Fund") and, if they had received less in total benefits under their new policies than they would have received under their old policies, to share in a Supplemental Extra Contractual Monetary Relief Fund of only $3 million ("Extra Contractual Fund"). The settlement, however, provided for a payment to Class Counsel of up to $4.5 million in attorney's fees.

The proposed settlement provided no reimbursement of the out-of-pocket losses which the uncontradicted evidence established that class members had suffered as a result of the payment of higher premiums for the new policies. The Class Representative testified that he had suffered out-of-pocket loss from the payment of these higher premiums (Tr. 672), which Class Counsel acknowledged (Tr. 748-49). The extent of the out-of-pocket loss incurred by class members from the payment of additional premiums for the new policies was established through the evidence developed in the *McAllister* case, which was presented to the Circuit Judge here. (J.A. 545-46, McA. 417-27). As noted above, not only were the new policies more expensive, but Liberty National moved policyholders into older age bands for which higher premiums were charged based upon their age at the time of the policy exchange. (J.A. 546).

Even though the settlement provides no relief for the money damages pled in the complaint, significantly, the settlement forecloses class members' claims for monetary damages arising out of the fraudulent exchange of their cancer policies, as well as all other claims for money damages for any other fraud perpetrated in conjunction with the exchange of their cancer policies. Pursuant to the settlement, every class member releases

> . . . Liberty National and each of its past, present, and/or future: parents, subsidiaries, affiliated and related entities and persons, officers, directors, shareholders, agents, successors, and assigns, separately and severally, of and from all claims, causes of action and liabilities (known or unknown) which have been or could be asserted by any Class Member, whether arising under

> state or federal statutory or common law, to the extent such claims, causes of action or liabilities arise from, are connected with, or are in any way based upon or related to any allegation of fraud, misrepresentation, concealment, failure to disclose, or other tortious conduct or breach of duty which occurred in whole or in part on or before the date of this Settlement Agreement, regarding (1) the alleged cancer policy exchange programs, (2) any other transaction resulting in the issuance of a new policy providing cancer coverage for a Class Member previously insured under an old policy, or (3) the failure to offer or issue any Class Member a new policy (the "Released Claims").

(J.A. 158-59).[8]

Not only does the release foreclose *all claims* for any fraudulent conduct which occurred in conjunction with the cancer exchange programs or the sale of new cancer policies, but the release broadly discharges any persons

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[8] The terms of the release clearly encompass all claims arising out of the issuance of new cancer policies, including, for example, the forgery of a signature on an application for a new policy. Class Counsel, however, unequivocally testified at the fairness hearing that the settlement of this action was only intended to release claims for damages arising out of the fraudulent exchange of an old cancer policy for a new policy:

> My understanding is that [the release] was to be connected with this type of fraud, a switch type, and if it went further than that, certainly, it is not what we agreed to . . . just because it is a cancer fraud, I don't believe it is to be released.

(Tr. 745). The Circuit Judge nonetheless failed to modify the provisions of the release in his final order approving the settlement.

or entities who engaged in such conduct, including Liberty National's parent corporation, Torchmark, and any agents involved in the frauds, even though Liberty National is the only named defendant. The settlement, however, does not provide any benefit, consideration or remedy either for other types of fraud in the sale of cancer insurance policies or for the release of these other entities.

On the same day that the Stipulation was filed, the Circuit Judge entered an order preliminarily approving the settlement in accordance with the Stipulation and reaffirming certification of a non opt out class pursuant to Rule 23(b)(2).[9] The order also set a fairness hearing for October 20, 1993; set forth provisions for notice to absent Class Members; required the filing of objections by absent class members; and enjoined and prohibited all members of the class from prosecuting any action asserting any claims which were proposed to be released pursuant to the settlement. (J.A. 168-80).

Petitioners submitted timely objections to the class certification, class notice, denial of discovery, issuance of injunction and the settlement prior to the October 10, 1993 deadline. (*See, e.g.*, J.A. 190-245). Petitioners' objections included the failure to afford Petitioners the right to opt out of the settlement as required by due process. (*Id.*).

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[9] Beginning on April 30, 1993, numerous Petitioners filed motions for leave to intervene for the purpose of objecting to class certification and requesting exclusion from the class (J.A. 93-106, 107-26) which were pending at the time the Circuit Judge preliminarily approved the settlement without notice to the Petitioners.

Petitioners also submitted a brief in support of the position that the certification of the class pursuant to Rule 23(b)(2) without an opt out was unconstitutional.[10] A fairness hearing pursuant to Rule 23(e) was held in January, 1994.

After the fairness hearing, Liberty National, with Class Counsel's consent, filed a motion for an order certifying the class for settlement purposes pursuant to Rules 23(a), 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2). (J.A. 386-391). There was *no* indication prior to or during the fairness hearing that class certification pursuant to Rule 23(b)(1)(A) or 23(b)(1)(B) would be considered by the Circuit Judge.

On February 4, 1994, the Circuit Judge issued an order proposing to conditionally approve the settlement (1) certifying the class pursuant to Rules 23(b)(1)(A) and 23(b)(1)(B) in addition to Rule 23(b)(2); (2) increasing the value of the Incidental Fund to $2,000,000; (3) increasing the value of the Extra Contractual Fund to $9,000,000; (4) increasing "restitution" to 150%; and (5) extending the premium freeze until the later of January 1, 1996, or one year after the Alabama Supreme Court entered a final order. The Circuit Judge agreed to approve the proposed settlement if these and other minor modifications were accepted by Class Counsel and Liberty National. (J.A. 392-404). Petitioners filed several objections to this order. (J.A. 405-52).

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[10] Petitioners' brief was not numbered separately in the record and its filing was recorded in the index to the clerk's record in the "index of miscellaneous boxes," Box #3.

On May 26, 1996 Class Counsel and Liberty National filed a notice accepting the Circuit Judge's modifications to the settlement set forth in the February 4, 1994 order (R.5651-55, 5735-40) and on that same day, the Circuit Judge approved the settlement as modified (Pet. App. 93a, 21a). The Circuit Judge's order certified the class on a non opt out basis pursuant to Rules 23(a), 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2); required all class members to release any pending and future claims for compensatory and punitive damages; determined that the class notice complied with the requirements of due process and Rule 23; permanently enjoined any class member from participating as a litigant in any action that was part of the "Released Claims" as originally defined in the Settlement; and approved the modified Settlement as being fair to the class. (Pet. App. 93a-106a).

D. The Decision of the Alabama Supreme Court.

On December 22, 1995, the Alabama Supreme Court affirmed the Circuit Judge's order and final judgment. The Alabama Supreme Court approved the Circuit Judge's finding that a class could be maintained on a non opt out basis under Rule 23(b)(2) by looking solely at the injunctive relief purportedly provided by the settlement, as opposed to the relief sought in the complaint and the claims released by the settlement, and by affirming, without analysis, the Circuit Judge's finding that Liberty National had acted on grounds generally applicable to the class. The Alabama Supreme Court similarly affirmed the trial court's finding that the class could be maintained

pursuant to Rules 23(b)(1)(A)and (B) without any analysis as to whether this action met the prerequisites of those rules and without regard to the settlement's foreclosure of Petitioners' claims for monetary damages. (Pet. App. 1a-20a).

SUMMARY OF ARGUMENT

The Alabama Supreme Court's decision affirming certification and settlement of this nationwide state court class action, without allowing class members a right to opt out, violates the Due Process Clause of the Fourteenth Amendment. Petitioners, all of whom suffered individual monetary damages as a result of the fraudulent exchange of their cancer policies, have been denied the procedural protections required by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and by the balancing test enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The claims pled in the complaint and released by the settlement are predominately, if not exclusively, claims for monetary damages. Under *Shutts*, the courts below thus erred in allowing certification of the class on a non opt out basis. Moreover, considering the property interests of class members in their individual claims for monetary damages, the need for additional procedural safeguards to eliminate the erroneous deprivation of those property interests, and the government's interest in efficient resolution of litigation, the certification and settlement of this class, without the right to opt out, does not satisfy due process.

ARGUMENT

THE CERTIFICATION AND SETTLEMENT OF THIS NATIONWIDE STATE COURT DAMAGES CLASS ACTION, WITH NO RIGHT TO OPT OUT, VIOLATES DUE PROCESS.

A. This state court class action seeks to "bind known plaintiffs concerning claims wholly or predominately for money judgments" and class members therefore should be allowed to opt out under *Phillips Petroleum Co. v. Shutts.*

The certification and settlement of this nationwide state court class action violates the Due Process Clause of the Fourteenth Amendment because the claims of class members for money damages are extinguished without affording class members an opportunity to opt out. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court held that a state court seeking "to bind an absent plaintiff concerning a claim for money damages or similar relief at law . . . must provide minimal procedural due process protection." *Shutts*, 472 U.S. at 811-12. Minimal due process protection includes "notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel" and *"an opportunity [for the absent plaintiff] to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."* *Shutts*, 472 U.S. at 812 (emphasis added).

This class action seeks to bind known plaintiffs, Alabama and nonresidents alike, "concerning claims wholly or predominately for money judgments." Accordingly,

this Court's decision in *Shutts* mandates that the members of this nationwide state court class action be afforded the right to opt out in order to satisfy the requirements of due process.

Each class member whose cancer policy was exchanged suffered out-of-pocket monetary damages based upon the payment of higher premiums for the new cancer policies, which in most cases also includes higher premiums incurred as a result of class members being shifted into older age bands. The payment of these higher premiums alone is sufficient to support a claim for fraud. *See Boswell*, 643 So. 2d at 585; *McAllister*, 675 So. 2d at 1298.

Moreover, class members who had cancer claims, all or part of which would have been paid under an old policy but were not covered under the new policy, suffered additional out-of-pocket monetary damages. Each class member also has a compensatory damages claim for mental anguish and a punitive damages claim. The settlement of this class action was designed to and does foreclose these individual claims for money damages arising out of the fraudulent exchange of class members' cancer insurance policies.

The relief initially sought by the Class Representative in this action and the relief claimed in cases outside the class confirm that the claims of class members are predominately individual claims for money damages. The Class Representative himself denominated this action as one for money damages both in his complaint and in his motion for class certification. At the initial hearing on class certification, Class Counsel stated that the relief

sought included money damages pursuant to Rule 23(b)(3). (J.A. 62). Not until the continuation of the certification hearing on March 8, 1993, when Class Counsel requested for the first time that the case be certified solely pursuant to Rule 23(b)(2), was this action ever characterized as one seeking declaratory and injunctive relief. (J.A. 74-75). Tellingly, the separate lawsuits arising out of the cancer exchange program which were filed by Class Counsel all sought only money damages, not injunctive relief. (J.A. 45-49, 79-81, 82-88). The lawsuits filed by other policyholders prior to certification of the class likewise sought money damages. *See, e.g., Boswell*, 643 So. 2d at 582; *McAllister*, 675 So. 2d at 1294.

Examining the nature of the claims and rights which class members are forced to release pursuant to the settlement further establishes that this action is one wholly or predominately for monetary damages.[11] The broad release imposed by the settlement extinguishes the class members' *individual claims at law for money damages*. The

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[11] Focusing on the claims or rights class members are required to release in a settlement, rather than the parties' characterization of the remedy, has been utilized previously as a means of determining whether an action is predominately for a money judgment. In *Raskin v. Birmingham Steel Corp.*, Civ. A. No. 11365, 1990 WL 193326 (Del. Ch. Dec. 4, 1990), the court stated:

> . . . in assessing whether a case is one "wholly or predominantly for a money judgment" . . . it is necessary to consider not simply the claims asserted in the complaint, but also those that will be barred by res judicata effect of a judgment or, in the context of a settlement, those that are to be released.

Id. at 6; *see also* Herbert B. Newberg & Alba Conte, *Newberg On Class Actions*, § 12.17 (3d ed. 1992).

only equitable or injunctive aspect of this action is the injunctive "remedy" manufactured by Class Counsel and Liberty National. When this action is considered from the perspective of the claims and rights that class members are being forced to give up, there is no doubt that the case is one "wholly or predominately" for money damages.

B. The Due Process Clause requires that when class members possess claims for money damages which will be extinguished by a class action settlement, they must be afforded the right to opt out with respect to those claims.

1. *Shutts* establishes that, in order to bind *any* class member with respect to claims "wholly or predominately" for money damages, due process requires that all absent class members be afforded the right to opt out.

Although *Shutts* was decided in the context of whether a state court could exercise jurisdiction over the claim of an absent class action plaintiff even though the plaintiff might not possess minimum jurisdictional contacts with the forum state, the Court's holding in *Shutts* articulates the minimum due process required to bind *any* class member with respect to an individual claim for money damages – notice, adequate representation and the right to opt out – not just those class members who lack minimum jurisdictional contacts. This Court's holding in *Shutts* is premised on the Court's recognition that a chose in action is a constitutionally recognized property interest possessed by each class member. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-20

(1950), *cited in Shutts*, 472 U.S. at 807. Under that aspect of due process, the existence of a right to opt out does not turn on whether the absent class members live in the forum state or a neighboring state, but rather on the need to allow class members the opportunity to exercise individual control over their own claims.

This Court, in holding in *Shutts* that a state court can only bind an absent plaintiff concerning a claim for money damages or similar relief at law by providing the right to opt out as well as notice and opportunity to be heard, recognized that in class actions involving individual claims for damages, class members are ensured an opportunity to be heard tailored to their individual circumstances only when they are afforded the right to exclude themselves from the class. *See Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970). Thus, the only reasonable reading of *Shutts* is that, because of the settlement's denial of opt out rights here, neither Petitioners nor any other of the absent class members could be bound by the trial court's order.[12]

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[12] Indeed, the language of this Court's holding in *Shutts* describes the minimum due process protections for all absent class members and gives no indication that absent class members who had minimum contracts with Kansas (the forum state) could have been denied notice and an opportunity to opt out. *Shutts*, 472 U.S. at 812 (citations omitted).

2. Application of the test enunciated by this Court in *Mathews v. Eldridge* demonstrates that due process requires that *all* of the absent class members, whether they reside in Alabama or elsewhere, must be afforded the right to opt out of this nationwide state court class action to pursue their individual money damages claims.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court set forth the test for determining "what process is due" before the government may deprive a person of an interest protected by the Due Process Clause. Although *Mathews* arose in the administrative rather than the judicial context at issue here, the constitutional origins of the right, and the analysis required, are identical. *See Lassiter v. Department of Social Serv.*, 452 U.S. 18, 33 (1981) (due process standards are intended to ensure that "judicial proceedings are fundamentally fair") (applying *Mathews v. Eldridge* factors to court proceeding involving termination of parental rights).

Under *Mathews*, three separate factors must be considered to determine the dictates of due process before the government may deprive a person of an interest protected by the Constitution:

> . . . first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional

> or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Subsequently, in *Connecticut v. Doehr*, 501 U.S. 1 (1991), this Court recognized that in a dispute between private parties, the burden of increased procedural protection often falls heaviest on the party who opposes the additional procedure. Thus, while giving due consideration to any interest the government might have in providing additional protection or foregoing the additional burden, this Court in *Doehr* also analyzed the private interest of the party who opposed the additional protections. When this case is analyzed in light of these four factors, the mandatory certification and settlement of this class action clearly fail to satisfy due process.

a. *The Private Interests Affected*. The property interests at stake in this case are the individual claims of each class member for money damages against Liberty National, its agents, and the other persons and entities liable for the fraudulent exchange of their cancer policies. All class members whose policies were exchanged have claims based upon the higher premiums charged for the new policies. Many class members have additional claims based upon increased premiums which were paid as a result of being shifted into an older age band. All class members whose policies were exchanged have claims for mental anguish and punitive damages. The value of the compensatory damages claims of class members who did not make claims against their policies alone is substantial as the $1,000 in compensatory damages awarded in *McAllister* demonstrates. (*See McAllister*, 675 So. 2d at 1294, Pet. App. 136a). Class members who had cancer

claims which were not covered by the new policies but which would have been covered by the old policies have additional, and obviously more significant, monetary claims.

The individual monetary claims extinguished by this settlement deserve due process protection, particularly when compared to other cases involving constitutionally protected property interests. In *Shutts*, for example, this Court held that due process required an opt-out right where the money damage claims of class members equaled approximately $100 each, which is less than what is at stake here. *Shutts*, 427 U.S. at 801. This Court similarly has given constitutional protection to "property" of relatively small dollar value. *See Parratt v. Taylor*, 451 U.S. 527, 529-30 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) ($23.50 hobby kit at issue).

The elimination of class members' claims for monetary damages thus implicates their right to due process. *Mullane*, 339 U.S. at 311, 313. When the property rights affected are deemed "substantial," this Court has recognized a significant private interest in additional procedural protections. *See Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 488-89 (1988) (citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-800 (1983)) (because tax sale had effect of "immediately and drastically diminishing" value of mortgagee's security interest, due process required direct notice of tax sale to mortgagee). In this case, the right to opt out would permit Petitioners to preserve and control their significant individual monetary claims.

b. *Risk of Erroneous Deprivation*. The terms of this settlement exemplify the unfairness which can result by prohibiting class members from removing themselves from a settlement which forecloses their individual claims for money damages. As discussed above, class members who did not make claims against their policies receive no monetary remedy and are afforded solely injunctive relief in the form of a "reformed" insurance policy. The settlement totally fails to compensate class members for the increase in premiums Liberty National fraudulently obtained by charging higher premiums for the new policies and by moving class members into higher age bands. Even more troubling, the settlement perpetuates Liberty National's profits from its fraudulent conduct.

The settlement contemplates that, in the event a class member makes a claim against his or her new policy in the future, the claim will be paid as if the new policy contained 100% coverage for radiation, chemotherapy or prescription drugs, but in all other respects will be paid pursuant to the terms of the new policy. Although the settlement provides for a freeze in premiums through the later of January 1, 1996, or one year after a final decision is rendered by the Alabama Supreme Court, after that time Liberty National is free to raise premiums at whatever rate Liberty National desires. (Tr. 684). By requiring class members who have not had cancer to continue to do business with Liberty National in order to obtain any benefit whatsoever from the settlement, the settlement not only preserves Liberty National's business but allows Liberty National to continue collecting the higher premiums it fraudulently obtained by moving class members into higher age bands.

The settlement provides that class members who made claims pursuant to their policies for radiation, chemotherapy, and prescription drugs before June 16, 1993, and who submitted a proof of claim form in this action before January 20, 1994, are entitled to "restitution"[13] and to share in the Incidental Fund. In order to share in the Extra Contractual Fund, class members must, in addition, have received less in total benefits under their new policies than they would have received under the old polices. The settlement, however, in no way accounts for the individual circumstances of such class members, including their mental anguish and other consequential damages.

Based upon the numbers which were introduced by Liberty National at the fairness hearing, as few as 167 class members of the approximately 300,000 class members whose policies were exchanged may be entitled to share in the Extra Contractual Fund (J.A. 617-18) and only 664 class members may be entitled to share in the Incidental Fund (J.A. 614-15). There is no logical explanation for allowing only this limited group of class members to participate in the monetary relief funds, which the trial court found to be in the nature of punitive damages. To the extent that all class members have the right to seek an award of punitive damages, it is grossly unfair to the vast

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[13] The settling parties and the trial court have loosely labeled as "restitution" the settlement's provisions paying 150% of the out-of-pocket costs of these class members. Such relief would be more properly characterized as money damages. *See In re School Asbestos Litig.*, 104 F.R.D. 422, 438-39 (E.D. Pa. 1984).

majority of class members to preclude them from participating in the monetary funds, while at the same time denying them the right to seek such damages in individual litigation.

The breadth of the release further highlights the risk of erroneous deprivation by denying class members an opportunity to opt out. As discussed above, the release forecloses any claims for fraudulent or other wrongful conduct which occurred in conjunction with the exchange of a cancer policy and discharges not only Liberty National but all persons or entities who might be liable for such fraudulent conduct.

The erroneous deprivation of class member's property interests which results from denial of a right to opt out also is illustrated by the effect of the mandatory settlement on non residents. Petitioners include residents of Mississippi, Georgia, Tennessee, Kentucky and Louisiana. Rule 23 allowing class actions has never been adopted by Mississippi and class actions are not recognized in Mississippi, yet Mississippi class members find themselves bound by a foreign state court class action with no right to opt out. Georgia prohibits certification of class actions in cases involving oral fraud. *See Stevens v. Thomas*, 361 S.E.2d 800, 804 (Ga. 1987). Georgia class members, however, find themselves bound by a state court class action in Alabama extinguishing their claim for damages arising from oral fraud which occurred in Georgia.

The risk of erroneous deprivation is most dramatically illustrated in this case by Class Counsel's manipulation of the class definition to allow his individual clients

to escape from the class.[14] If the settlement Class Counsel negotiated was not good enough for his own individual clients, due process should not permit him to impose that settlement on unwilling absent class members. When one further considers the failure to provide any monetary relief to the great majority of class members, the $150,000 paid to the Class Representative on the day the class was certified to settle his life insurance claim and the $4.5 million attorney's fee paid to Class Counsel, the need for permitting the absent class members to exercise individual control over their own damages claims becomes readily apparent.

Even before *Shutts*, courts often expressed concern about the due process rights of absent plaintiffs being foreclosed by class actions seeking damages. *See, e.g., Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 634 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) (certification under (b)(2) limited to injunctive relief to protect opt

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[14] The filing of these individual lawsuits, together with substantial other evidence, demonstrates that the Petitioners were denied adequate representation as required by due process. *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940). Such evidence includes the lack of typicality of the claims of the Class Representative from other class members; the $150,000 paid to the Class Representative to settle his claim based upon fraudulent loans against his life insurance policy (Tr. 677) on the same day the class action was certified; the allocation of the monetary funds provided by the settlement, *see Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630-31 (3d Cir.), *cert. granted*, 65 U.S.L.W. 3159 (U.S. Nov. 1, 1996) (No. 96-270); the evidence that the class action was already settled at the time class certification was sought; and the breadth of the release. This Court need not reach the issue of adequacy, however, if it accords Petitioners the right to opt out.

out with respect to claims for damages). The potential for diverging interests in class actions involving substantial money damages has led some courts to recognize the need to allow absent class members the right to opt out of even purportedly "mandatory" classes. *Penson v. Terminal Transp. Co., Inc.*, 634 F.2d 989, 994 (5th Cir. 1981) (permitting class members to opt out of (b)(2) class action was allowed on ground that, when individual monetary relief is sought, the class "begins to resemble a 23(b)(3) action and there has been more concern with protecting the due process rights of the individual class members . . . "). In *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), the Eleventh Circuit Court of Appeals recognized the importance of providing the right to opt out even in an action certified pursuant to Rule 23(b)(2), when class members have unique claims for monetary damages. The Eleventh Circuit stated there:

> Because many monetary claims in cases are unique to individual class members, we hold that the right to opt out of the class, normally accorded only to members of classes certified under Rule 23(b)(3), must be extended to all members of this (b)(2) class.

Id. at 1152.

In cases properly certified pursuant to (b)(1) and (b)(2) but which nonetheless include claims for monetary relief, courts have found that other safeguards may adequately compensate for the lack of an opt out right. For example, courts have emphasized that, when the interests of such a class are completely unified and there is no possibility of any difference among class members, this

cohesiveness, in addition to adequate representation, provides an appropriate due process protection. *See Califano v. Yamasaki*, 442 U.S. 682 (1979) (class sought equitable relief concerning procedures for recouping Social Security overpayments); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 251 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) ("The cohesive characteristics of the class are the vital core of a (b)(2) action."). But such actions for recoupment of government benefits or for back pay in an employment discrimination suit do not involve the individual issues that characterize fraud claims for unliquidated monetary damages.

In some cases, courts have afforded additional due process protection with respect to individual damages claims by allowing class members an opportunity to assert individual damages claims in the same action. For example, in *King v. South Central Bell Tel. & Tel. Co.*, 790 F.2d 524, 529 (6th Cir. 1986), the class members received individual notice of both the settlement adjudicating claims arising out of a maternity leave policy and their opportunity to make a personal claim for monetary relief and/or to object to the settlement.

This case, which clearly was not properly certified under either Rule 23(b)(1) or (b)(2),[15] affords none of

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[15] The certification of this action pursuant to Rules 23(b)(1)(A) and 23(b)(1)(B) *after* the fairness hearing without any notice to class members is contrary to the law and unsupported by the facts. The mere fact that some plaintiffs may be successful in lawsuits against a defendant, while others may not, is not a ground for invoking Rule 23(b)(1)(A). *See In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984); *McDonnell Douglas Corp. v. United States Dist. Court for the Cent. Dist.*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert denied*, 425 U.S. 911 (1976). Petitioners' claims are predominately for money damages and the Circuit Judge's other findings in this case regarding Rule 23(b)(1)(A), do not support a conclusion that certification under Rule 23(b)(1)(A) is appropriate.

While cases have held that a "limited fund" theory may be a justification for a class action under Rule 23(b)(1)(B), *as a matter of law*, a trial court must give notice of and conduct a hearing on the factual issue of whether there is a limited fund and must allow the opponents of class certification to present evidence that a limited fund does not exist. *See In re Bendectin Prods. Liab. Litig.*, 749 F.2d at 306; *In re Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

these other safeguards. The claims of all class members are dissimilar in substantial respects and are divergent among groups of class members in other respects. The lack of cohesiveness here does not satisfy due process, and Petitioners erroneously have been deprived of their property interests in their individual monetary claims.

c. *The Government's Interest.* Any governmental interest in efficient and expeditious resolution of claims through class actions is outweighed by the government's significant interest in ensuring that the class action procedure does not wrongly deprive the property rights of citizens who have had no opportunity to protect themselves by opting out of the class. Moreover, while public policy generally favors settlements, such a generalized interest in fostering settlements cannot override the government's interest in ensuring that procedures produce equitable results:

> The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1968).

In any event, permitting an opt out would not deter settlements for several reasons. First, class actions for money damages under Federal Rule of Civil Procedure 23(b)(3), and state law equivalents, such as Alabama Rule of Civil Procedure 23(b)(3), already give class members that opportunity. Nevertheless, as a recent Federal Judicial Center study found, most damages class actions, both large and small, are settled, including many where some of the claimants have very substantial claims. Empirical Study of Class Actions in Four Federal District Courts – Final Report to the Advisory Committee on Civil Rules, 10, 59-62, 177 (Federal Judicial Center 1986). Second, where settlements provide meaningful benefits, unlike the present action, very few claimants will choose to run the risk of bettering the outcome by filing their own individual actions, unless they have very large claims and a strong likelihood of success. Indeed, generally the number of class members who exclude themselves from opt out class actions is generally very small. Empirical Study, *supra*, at 10, 52-54.

d. *Liberty National's Interest.* Liberty National may contend that it has relied on the settlement over the past

three years, but that is hardly a reason for denying a right to opt out. First, the case is still on direct appeal and Liberty National was fully aware of this contingency since the order approving the settlement specifically refers to the appeal process. (Pet. App. 99a-100a). Second, although an interest in repose exists in all cases that are resolved by settlement or by litigation, this interest is only one factor and must be viewed against the backdrop of class action litigation. The Third Circuit recognized in its decision allowing collateral attack in the *Ticor* litigation that:

> [i]t is partly up to the defendant to safeguard the interest of the absent plaintiffs. *See* [*Shutts*,] 472 U.S. at 810, 105 S. Ct. at 2973. If the defendant wishes to achieve maximum preclusive effect, it is up to the defendant to insure that the class is appropriately certified, and the absent members are adequately represented. Far from wreaking havoc on the class action mechanism, we believe that our holding will foster results that most fairly balance the interests of absent class members and defendants alike.

In re Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 770 (3d. Cir.), *cert. denied*, 493 U.S. 821 (1989). While Liberty National's interest in repose is entitled to consideration, even in the context of a later filed collateral attack, this interest has never been, and should never be, dispositive. *See Hansberry*, 311 U.S. at 40.

Liberty National is likely to argue that it has an interest in avoiding the costs of repetitive lawsuits, but that simply begs the question. Alabama law, and the law of all other states, protects the right of citizens to sue over the type of fraudulent conduct perpetrated here. The

threat of repetitive suits can be lessened by use of a class action settlement, even when an opt out right is provided, so long as the settlement provides fair relief to all those affected. Liberty National cannot complain that providing the right to opt out is too costly, when opt outs can be minimized, and possibly eliminated, by reasonable settlement terms that make resort to individual litigation unnecessary except in unusual circumstances.

e. *The Balance Lies Decidedly In Petitioners' Favor.* As set forth above, the Court's analysis in this case, even for Alabama residents, should be governed by *Shutts*. If the Court applies the *Mathews v. Eldridge* analysis, however, to decide whether the protection given class members was adequate, when judged by the standard of *Mathews*, there can be no doubt that Petitioners will receive the due process to which they are entitled only if the judgment below is reversed. *See also Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

The validity and value of the monetary claims of class members which are eliminated by the settlement are well established, as the Alabama Supreme Court's decisions in *Boswell* and *McAllister* establish. The risk of erroneous deprivation is high, as the settlement broadly extinguishes class members' claims, including those for payment of the inflated premiums, while providing relief that is of little or no value to the vast majority of the class members. The only way to prevent this erroneous deprivation is to allow individual class members to control their own claims against Liberty National and others arising out of the cancer exchange program by affording them the right to opt out. The governmental interests in class litigation and settlement are outweighed by the

states' considerable interest in preventing their citizens from becoming the victims of unfair class settlements. And, finally, any interest of Liberty National in repose is not very substantial, when the case is on direct appeal and when Liberty National could have prevented the attack on the settlement by affording an opt out right.

Based on all these considerations, Petitioners will receive all the process to which they are due only if this Court refuses to foreclose their individual damages claims and upholds their right to opt out. When Petitioners' property interests in their claims for individual monetary damages, and the unfairness of foreclosing their damages claims in light of the relief afforded by the settlement, are balanced against the interests of the government and Liberty National, the scale weighs heavily in favor of requiring a right to opt out to avoid the erroneous deprivation of class members' property interests.

C. The historical development of class actions demonstrates that the right to opt out is constitutionally mandated in a case involving claims "wholly or predominately" for money damages.

Historically, the claims for individual money damages encompassed by this class action could never have been subject to mandatory class resolution. Class action jurisprudence prior to the 1966 Amendments to the Federal Rule of Civil Procedure 23 recognized the due process interest in claims for money damages, and thus the circumstances under which absentees could be subject to the *res judicata* effect of a class proceeding were strictly limited. Neither the 1966 change in the Federal Rules nor

the concomitant adoption of similar class action provisions by states such as Alabama have altered the due process limitations on the binding effect of class actions, and in this case class members have been denied their constitutional right to be free from that binding effect.

Prior to 1966, claims for damages could not be brought in a binding class action unless they involved assertion of a common legal right, or unless they were *in rem* claims against a naturally limited fund or resource. *See, e.g., Smith v. Swormstedt,* 16 How. 288, 57 U.S. 288 (1854) (claims against a church fund known as the "Book Concern"); *Hartford Life Ins. Co. v. Ibs,* 237 U.S. 662 (1915) (claims to a limited insurance fund); *Leadville Coal Co. v. McCreery,* 141 U.S. 475 (1891) (distribution of assets of a corporation in receivership). Class actions under the 1938 version of Rule 23 were divided into three types: "true" and "hybrid" class actions that would bind all absent class members, and "spurious," or "common question" actions which required that absent class members "opt in." The "hybrid" actions that were antecedents of actions brought under modern Rule 23(b)(1)(B) were limited to cases involving equitable claims to recover and distribute "specific property." *See* 7A Charles A. Wright, Arthur Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1752 at 16 (1986). In contrast, if the claims of class members "had a direct effect on the personal rights or duties of individual class members by, for example, adjudicating contract rights or obligations determining tort liability[,]" then the class action was "spurious" and did not bind non-participating class members. Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation,* 70 B.U. L. Rev. 213, 282 (1990). Such spurious actions were in reality not class actions at all and were instead nothing more than a device for permissive joinder. 7A Wright, Miller & Kane, *supra,* § 1752 at 29.[16]

Although the 1966 Amendments to Rule 23 expanded the reach of class actions, they did so with a heightened recognition of the need to protect the due process rights of absent class members. With the adoption of Federal Rule of Civil Procedure 23(b)(3), the class device was for the first time applied to "common question" cases seeking damages at law. Recognizing that class members with claims at law for monetary damages are only afforded due process if they are allowed to control their individual claims by opting out, the drafters of the 1966 Amendments required that class members receive both notice and the right to opt out, Fed. R. Civ. P. 23(c)(2), in addition to the other procedural protections set forth in Rule 23. The 1966 Notes of the Rules Advisory Committee explicitly recognized that notice and the right to opt out were necessary to protect the due process rights of class members with damages claims:

> [T]he interests of individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. *Thus the court is required to direct notice*

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[16] Under the 1938 version of Rule 23, "spurious" classes were defined as involving rights which were "several, and there is a common question of law or fact affecting the several rights and a common relief is sought." Fed. R. Civ. P. 23(a)(3) (1938), 28 U.S.C. app. at 6101 (1964).

> *to the members of the class of the right of each member to be excluded from the class upon his request.*
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> • • •
>
> [N]otice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. *This mandatory notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.*

Notes of Rules Advisory Committee to 1966 Amendments to Rule 23, 39 F.R.D. 95, 105-07 (emphasis added) (citing, e.g., *Hansberry v. Lee*, 311 U.S. 32 (1940)).

Prior to 1966, this case could only have been brought as a "spurious" class action that required knowing, affirmative, voluntary participation in order to bind class members. The fraud claims of the policyholders here unquestionably involve "joint and several" tort obligations. They are *in personam* claims against solvent defendants, rather than *in rem* claims against some common fund or property. Under such circumstances, due process demands that class members have the opportunity to exercise individual control over those claims by excluding themselves from the class.

CONCLUSION

This case demonstrates how class actions can be manipulated to trample the due process rights of the victims of fraudulent conduct by depriving them of the right to opt out of a class action which extinguishes their individual and predominately monetary damages claims. The certification and settlement of this nationwide state court class action with no right to opt out violates due process. Accordingly, the holding of the Alabama Supreme Court should be reversed, and Petitioners should be allowed to opt out of the class settlement.

Respectfully submitted,

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ALABAMA RULES OF CIVIL PROCEDURE
RULE 23. CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or

not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they

consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(dc) District Court Rule. Rule 23 does not apply in the district courts.

[Amended effective October 1, 1995.]

FEDERAL RULES CIVIL PROCEDURE
RULE 23. CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the

representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that

the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

NAMES OF PETITIONERS

Case No. 1931603 – *Guy E. Adams, et al. v. Charlie Frank Robertson, et al.:*

Guy E. and Alice S. Adams
Retha B. Attaway
Herman and Beatrice Bateman
Edna F. Brock
Hubert and Ruth Bullington
Dr. Neil Capper
Billy and Anna Clausen
John and Mary Day
Arthur and Peggy Dickinson
Edith E. Fellows
Mary L. Fowler
Leonard H. Griffith
Sara E. Griffith
Willard C. Griffith
Ellis and Joyce Harvell
John and Hazel Jefferson
Gussie and Willa Johnson
Lawrence A. Johnson
Johnnie and Bertha Jones
Jabie I. and Johnny Lane
Fred and Linda Lewter
James R. McGahagin
Martha Massengale
Seraphim Massengale
David W. Mooney
David and Catherine Nelson
Floyd E. and Delores H. Nelson
Ethel M. Offord
Rebekah Oliver
Geneva Parden
Mary Perez
Estelle Permenter, individually and as Executrix of the Estate of Vernon E. Permenter

Arnold F. and Almitta Pitt
Rosa Lee Prosser
Alex and Doris Rivers
Ola Saxon
Joseph and Joy Savell
Brenda Sexton
John and Mary Stockman
Jean M. Sullivan
James R. and Linda S. Swilley
Dawn R. Tubb
John and Grace Turner
Colonel and Jeanne Weaver
Catherine H. Whigham
James and Betty White
Thomas White, as Executor for Edna M. White
Sheila White
Tommy White
Bertha Williams
Melvin and Rita Williams

Case No. 1931604 – *Thomas Beck, et al. v. Charlie Frank Robertson, et al.:*

Thomas Beck
William Bostic, Jr.
Grover and Mary Bowdin
Rufus W. and Laura A. Burch
Ken and Harriett Brown
William and Peggy Chappelle
Clarence W. Coleman, Jr.
Cooper and Mazel Cowart
Esther Crabtree
John W. and Susan Curtis
William E. and Sue K. Davis
Norman Dicken
Debra Dickerson
Charles B. and Mary E. Duckworth
James and Ruth Elmore

Michael D. and Teresa Evans
James Faircloth
Lynn Fillingim
C. Henry and Patricia Fox
Emanuel A., Sr. and Gloria Gazzier
Carolyn C. Gray
Stella L. Gregory
John and Evelyn Harris
Elmore and Willie D. Harvison
Jimmy Harvison
Ruthie Harvison
Nettie Helton
Opal Herm
Pelham and Jewel Hollingsworth
Tony and Anita Hopper
Billy and Kathy Hoven
Cathy Howard
Andrew and Dwanna Howle
Andrew J. and Betty Howle
Ann Jacobson
Jimmy G. and Eloise James
Thomas and Aravictoria B. Kelly
James W. Kilgore
Clyde and Barbara Kohn
George and Mary Kountz
W. Guy LeCrory
Darrell and Michelle Ladnier
Joseph G. and Wanda R. Loftin
Paul and Beth Marshall
Michelle Mayberry
James and Sandra McGuff
George and Hazel Nicholas
Malcolm and Vivian Nicholas
Martha Partridge
Glenn and Margie Perkins
Thomas R. and Margaret L. Pierce
Diana Rampey

Felix and Lori Reynolds
Ernest Rhone
John M. Sirmon
John W. and Maybelle Sirmon
Bessie R. Tipp
Cecil R. and Peggy Trawick
A.C. Vickery
Margaret Vickery
Louis and Caroline White
Lena O. and Arthur Williams
Kimberly Wilson
Rodger and Paulette Wilson
Mr. and Mrs. Franklin Wood
Franklin Wood, Jr.

Case No. 1931605 – *David Cox, et al. v. Charlie Frank Robertson, et al.:*

David & Elizabeth Cox
Julius E. & Doris Davis
William J. Miller
Susan Q. Miller
George W. Mears
Brenda M. Foster
Jessie E. Mears
Edward E. Russ
Charles E. Jones
James M. Jones
Andrew J. Stewart, Jr.
Peggy L. Winchester
Jerry & Marian H. Davis
Ernest L. Howze
William W. Howell
Billy R. & Arlene Huggins
John E. Harrington, Jr.
James Patrick & Anne McKeown
Sheila C. Hubbert
William J. Barbour

Robin E. Barbour
Arthur Perry Barbour
Carolyn D. Barbour
Elton M. & Elizabeth D. Gunnin
Noel & Rosemary Mount
Kathy L. Wilson
Dorothy A. White
Patricia S. & James A. Strength (deceased)
Naomi W. Strength
Nolan P., Jr. & Carol E. Cooper
Everitt & Deborah E. Averitt
Richard, Sr. (deceased) & Jessie H. Beckish
Patricia Sauce
Joseph & Claudia Wittner
Calvin E. Bosarge
Johnny M. & Josephine Farrior
Martin J. Powers
Diane D. Drew
Bonnie J. Rhodes Sprinkle
Martha L. & Brady S. Eubanks
William L. & Dorothy Darnell
Beatrice B. Waite
John H. Bull, Jr.
Jerald & Margaret Jaye
James E. Cook
Arland A. Cook
Bernice Finlay
Carlos & Delores R. Williams
N.H. & Joan Bankston on behalf of Bradford Smith & Amy Smith
Betty Turner
Norma Jean Wittner
Myra Jean Wittner
Claudia Wittner as Guardian of Veronica Lynn Turner
Raymond & Joan N. Young

Case No. 1931606 – *Vernon E. Adamson, Sr., et al. v. Charlie Frank Robertson, et al.:*

Mr. and Mrs. Vernon E. Adamson, Sr.
Sybil R. Blackwell
Marsha N. Britton
Vera K. Bynum
Mr. and Mrs. Charles D. Byrd
Mr. and Mrs. James L. Calcote
Mr. and Mrs. William W. Chunn
Edwina C. Clearman
SaMartha B. Colvin
Janet Cook
Kenneth H. Cook
Helen H. Day, Ind. and as Executrix of Est. of Raymond H. Day, Dec.
Ronald V. Dixon
Louise N. Dunaway
Carol B. Golden
Joseph R. Havard, and the Est. of Brenda L. Havard
Myrtle O. Hawman
Mr. and Mrs. Mark L. Howell
Mr. and Mrs. Foster L. Jones, Jr.
Jewel N. Jones
Ellen R. Lesley
Eunice W. Long
Myrna B. Matthews
Mr. and Mrs. Allen K. Middleton
Alberta D. Overstreet
Vivian C. Overstreet
Mr. and Mrs. Maurice E. Perkins, Jr.
Betty T. Phillips
Mr. and Mrs. George R. Reeves, Sr.
Mr. and Mrs. James R. Reeves, Sr.
Helen R. Rhodes
Mr. and Mrs. Carlton D. Robertson
Mr. and Mrs. Allen H. Ryals
Dorothy H. Scoggins

Thomas G. Scoggins, Jr.
Mildred L. Smith
Daniel A. Warren
Dorthy A. Warren
Randal S. Warren
Timothy J. Warren
Mr. and Mrs. Max L. Yates

Case No. 1931607 – *Darlene Skinner, et al. v. Charlie Frank Robertson, et al.:*

Darlene Skinner
Walton K. Skinner
Judy K. Gann
Jodie E. Gann
Teresa Mize, Ind. and as Executrix of Est. of Carol Thomason
Jean Stoltz
Lena Latham
Howard F. Smith
Alfred Hancock
Elvis D. Ray
Magoline Ray
Randall L. Garner

Case No. 1931610 – *David L. Lynd, et al. v. Charlie Frank Robertson, et al.:*

David L. Lynd
Elizabeth S. Lynd
Pat DeSantis
Angela DeSantis
James V. Stowe
Wilanne S. Stowe
Juanita R. Stowe
Wesley R. Beech, Sr.
Margaret Beech
Donald Rayford Williams
Olga N. Williams
Mickie E. Ray

Willie J. Ray
Albert E. Ray
Cora Q. Ray
Patrick Ray
Donald L. Allen
Mary J. Allen
William A. Barnes
Alma G. Barnes
Grace Biondolillo
Sallie M. Conway
Deborah M. Cox
Tommy R. Cox
Della M. Finlay
Mrs. Lore Franklin
Douglas W. Howell
Daisy D. Howell
Lucille J. Jackson
Theodore W. Jockisch
Francis L. Jockisch
Lois N. Klaas
Phillip Bruce Lumpkin
Gloria W. Lumpkin
Floyd J. Miller
Annie G. Miller
James E. Mitchener, Sr.
Sally F. Mitchener
Hubert R. Odom
Catherin J. Odom
Thomas Wayne Smith
Sue Ann Smith
Warren G. Stanley, Jr.
Vicki H. Stanley
Norris F. Woodard
Lois M. Woodard
James E. Wooley
Linda C. Wooley
Ashton B. Cannon

Carolyn Cannon
Leslie C. Collings
Edna W. Collings
Lottie Trest
William C. Trest
William D. Knapp
Ruby Knapp
Ruby Walker
Jaime Phillips
Augustus L. Smith
Patricia L. Smith
Donald E. Smith
Karen K. Smith
David A. Rose, Sr.
Kay I. Rose
Essie Lee Taylor
Henry D. Whigham
Gloria Whigham
Ruby M. Taylor
Hiram R. Burge
William C. Smith
Jean M. Smith
Gail Pruitt
Bennie F. Baker
Gladys R. Baker
Joann B. Voivedich
Julian Tedder
Betty B. Tedder
Raymond Guy
Deborah Guy
Wyone Guy
Charles R. Gilbert
Delores M. Gilbert
Susan Trest Price
Rayford Hinton, Jr.
Judith C. Hinton
Robert Venek

Telecia Paulk (f/n/a) Telecia Gibbs
James P. Cazalas, Sr.
Brenda S. Cazalas
Leo C. Crain
Sandra E. Crain
Jesse M. Turner
Hugh F. McCoy
Byron D. Ray, Jr.
Lynn M. Ray
Joseph H. Lofton
Carel D. Bush
James F. Willis, Sr.
Anita D. Willis
Louie B. and Joye Spear
Kevin Morrow as Executor of Carol Morrow
Deborah R. McDonald as Executor of Largene C. Rodgers
*Guy Aubrey Bell
*Elouise Bell
*Joe Nance
*Julia Nance
*Oleta Davis
*Prentiss Davis
*Lucille L. Maples
*Howard Maples
*Jo Minter Bender
*Bradis M. Crocker
*Artis Crocker
*James A. Bonniwell
*James W. Scott
*Betty Crawley
*Vester Crawley
*Ray Robert Garriga
*Penelope De Santis
*Annie M. Burge

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*The names of these Petitioners were inadvertently omitted from the list of Petitioners included in the Appendix to the Petition.

*Dorothy A. McCoy
*Fern Garriga
*Clydia Alford
*Luby Peterson

Case No. 1931611 – *Lucille Williams, et al. v. Charlie Frank Robertson, et al.:*

Lucille Williams
James C. Griswold
Joseph F. Watson
Betty Knowles
Neal Knowles
Aline Orso
Randy Touchstone
Phyllis Touchstone
Joseph Touchstone
Gloria Touchstone
June L. Barrow
Betty Terry
William Terry
Elizabeth Miller
Verna L. Cornelius

Case No. 1931614 – *Douglas C. Hammac, et al. v. Charlie Frank Robertson, et al.:*

Mr. and Mrs. Douglas C. Hammac
Pamela & Terry Knight
Mr. and Mrs. Victor Lazzari, Jr.

Case No. 1931615 – *Artemus Lane Nobles, et al. v. Charlie Frank Robertson, et al.:*

Artemus Lane Nobles
Anah Allen

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*The names of these Petitioners were inadvertently omitted from the list of Petitioners included in the Appendix to the Petition.

Roger Bayles
Susan Davis Brown
Kristopher Kyle Dailey
Oscar H. Goree, Jr.
Ann Harden
Jeffrey H. Harden
Wilbur Harden
Charles Johnson
Mary Johnson
Irma Schaefer
Richard T. Schaefer
Betty Yarbrough
Sibley McKenzie
Loretta McKenzie
John R. Sellers

Case No. 1931616 – *Florence W. Clayton, et al. v. Charlie Frank Robertson, et al.:*

Florence W. Clayton
Thurman F. Clayton
Wayne F. Clayton
Iveynelle Clayton
Woodrow Johnston
Gladys D. Johnston, Deceased
Eula Mae Books

Case No. 1931617 – *Larry L. Andrews, et al. v. Charlie Frank Robertson, et al.:*

Larry L. Andrews
Jane M. Ankerson
Rosalie B. Ankerson
Edward J. Arata, Jr.
August T. Bozant
Teresa R. Bozant
Mr. and Mrs. Thomas Brettel
Joseph E. Broughton
Susan L. Brown (Lewis)

Mr. and Mrs. Michael Burgess
Madeline K. Burnes
Linda D. Butts
Richard S. Butts
Robert C. Butts
William H. Butts
Shirley & Jesse Carlisle
James P. Cofield
Barbara Cooper
Lillie J. Cooper
Pat Estes
Ruth F. Granade
Daphne P. Kelley
Douglas E. Kelly
Berry Kitchens
Doris Hewett
John S. Hewett
Mr. and Mrs. Robert Holifield
Mr. and Mrs. George Lewis
Ms. Shawn M. Lewis
Mr. and Mrs. Byron Lundy
Lucille McPherson
Kevin McPherson
Catherine A. McRae (Beck)
Lucille L. McRae
John A. McRae
Monica G. Merifield
Catherine M. Parker
Estate of Ms. Jewell Pierce, Deceased
David Pitt
Mr. and Mrs. Melvin Pitt
Mr. and Mrs. Michael Presley
Rhonda L. Pulliam
Jerry L. Pulliam
Douglas Revere
Richard Russell
Nelma G. Shewmake

Curtis L. Shewmake
Cleveland Smith
Mr. and Mrs. Gary Smith
Cecilia R. Street
John D. Turner, II
